UNITED NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 786

Case No. 865: DOMATO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas, at the request of Angelina Domato, a former staff member of the United Nations Population Fund (hereinafter referred to as UNFPA), the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 July 1995;

Whereas, on 15 June 1995, the Applicant filed an application requesting the Tribunal to order the Respondent to provide certain information and documentation and, further:

(a) To rescind the decision of the Secretary-General of 3 February 1995, based on the recommendation of the Joint Appeals Board (JAB) of 26 January 1995, not to extend the Applicant's fixed-term appointment beyond 14 February 1995;

(b) To order that UNFPA reinstate the Applicant in the Service of the Organization retroactive from 14 February 1995;

(c) To order that the Secretary-General pay the Applicant her salary and appropriate allowances retroactive [to] 14 February 1995 as well as appropriate contributions on her behalf to the United Nations Joint Staff Pension Fund retroactive [to] 14 February 1995;

(d) To award the Applicant appropriate and adequate compensation for the material and moral injuries suffered by her as a direct consequence of the arbitrary and prejudicial decision taken by UNFPA not to extend her contract beyond 14 October 1994."

Whereas the Respondent filed his answer on 21 November 1995;

Whereas the Applicant filed written observations on 27 March 1996;

Whereas the facts in the case are as follows:

Beginning in 1985, the Applicant worked as a consultant with UNFPA and UNICEF in Burkina Faso and in Afghanistan, respectively, and in the UN Population Division. The Applicant entered the service of UNFPA on 13 August 1990, as an Evaluation Officer at the P-3 level, on a six-month fixed-term appointment. On 15 October 1990, her appointment was extended for approximately two years, and renewed twice thereafter, for additional periods of one year each. It was further extended to 14 November 1994 and, subsequently, through 14 February 1995. The Applicant separated from service on 14 February 1995.

The Applicant received three annual performance appraisal reviews (PARs), for the years 1991, 1992 and 1993. The Applicant's PAR for 1991 indicated a rating from her supervisor of (3) ("meets the expectations of the performance plan"), which was downgraded by the Management Review Group (MRG) to a rating of (4) ("meets some of the expectations of the performance plan but performance needs improvement"). As regards the Applicant's performance in 1992, her supervisor recommended, and the MRG endorsed, a rating of (3). For her 1993 performance, her supervisor recommended, and the MRG endorsed, a rating of (4). In a memorandum dated 14 February 1994, the Applicant submitted to the Chief, Personnel Branch, Division for

Applicant was suspended without pay for failing to resume his duties since 27 January 1973. His PER for that year stated that he maintained "only a minimum standard of efficiency" and his annual increment was deferred for six months. His PERs for 1974 and 1975 showed a "good standard of efficiency". His performance for the years 1976 through 1979 was rated "satisfactory". In 1980, he was rated "an unsatisfactory staff member". By a letter dated 15 May 1980, the Applicant was given a "final warning" by the Director of UNRWA Operations (DUO), Gaza, and was placed on probation for one year. By a letter from the Acting Field Administrative and Finance Officer, UNRWA, Gaza, dated 2 January 1981, the Applicant was informed that his services would be terminated on medical grounds pursuant to Area staff rule 109.7. The Applicant appealed this decision and, on 19 June 1981, the Joint Appeals Board (JAB) recommended that the Applicant be reinstated in another suitable post. The Applicant was reinstated with effect from 3 January 1981.

By a letter dated 8 August 1982, from the DUO, Gaza, the Applicant was informed that, effective 7 September 1982, his appointment was to be terminated in the interest of the Agency, due to his unsatisfactory performance.

The Applicant submitted an appeal against this decision to the JAB on 18 September 1982. In its report dated 19 November 1982, the JAB upheld his termination. It recommended, on humanitarian grounds and in view of the Applicant's long service with the Agency, that he be given priority for reinstatement in a non-teaching post. Effective 1 March 1985, the Applicant was re-employed by the Agency in the Eligibility and Registration Division as a Clerk "D".

On 3 January 1994, a Senior Clerk was transferred to the post of Acting Camp Eligibility and Registration Officer (A/CERO) in Deir-el-Balah, the Applicant's place of work. By letter of 23 January 1994, the Applicant complained to the Field Administrative Officer that this transfer had deprived the Applicant of the post of A/CERO and the associated "privileges". By letter of

27 January 1994, the Field Administrative Officer replied that the Applicant had no right to be appointed as A/CERO and the appointment of the Senior Clerk to the post would, in any event, have no bearing on the Applicant's prospect of being promoted to the position of CERO. Further correspondence on this subject followed.

A periodic report on the Applicant was completed on 12 February 1994; the Applicant's immediate supervisor, the CERO, gave the Applicant low ratings throughout. The CERO also noted that: "He is not ready to hear any discussion to improve his situation from any supervisor". The Applicant's intermediate reporting officer, the Field Eligibility, Registration, Distribution and Accommodation Officer, rated the Applicant as "on the whole, an unsatisfactory staff member", and his overall supervisor, the Acting Deputy Chief, Field Relief and Social Services Programme, noted in the report that the Applicant's supervisor (the CERO) had advised that the Applicant would not do any job requested by the CERO.

On 22 February 1994, the Acting Chief of the Field Relief and Social Services Programme sent a memorandum to the Field Administrative Officer concerning the Applicant's refusal to cooperate with the CERO and to carry out work assigned by him. On 2 March 1994, the Field Administrative Officer wrote to the Applicant censuring him and suspending him without pay for three days due to the latter's refusal to follow instructions from his superiors. The letter warned the Applicant that, should his official conduct again be the subject of a complaint, the Agency would be obliged to take action, which might include termination.

On 5 March 1994, the Field Administrative Officer again wrote to the Applicant concerning his performance. As a result of the deficiencies and inadequacies identified in the Applicant's periodic report, the Agency decided to defer consideration of the Applicant's annual increment for three months.

In a reply dated the same day, to the Field Administrative Officer, the Applicant objected to his suspension without pay

(notified to him by the letter of 2 March 1994) and restated his earlier objection to the appointment of the Senior Clerk as CERO. He stated: "I cannot cooperate with [him]. He is nothing in comparison with me. He is the wrong person in the wrong place. He has not any skills or competence."

On 7 March 1994, the Field Eligibility, Registration, Distribution and Accommodation Officer sent an action slip to the Acting Deputy Chief of the Field Relief and Social Services Programme in which he advised him of the Applicant's continued failure to cooperate with the CERO and of his insistence on performing work during his suspension.

On 8 March 1994, the Field Administrative Officer addressed a "Final Warning" letter to the Applicant. He reiterated that the Agency would not "tolerate gross insubordination", such as refusing to cooperate with his superiors, and noted that the Applicant's performance was "unsatisfactory in almost every respect". He warned the Applicant that if his performance did not improve markedly, the Agency would terminate his services.

On 3 April 1994, the Acting Chief, Field Relief and Social Services Programme, notified the Field Administrative Officer that the Applicant was refusing to cooperate with his supervisor (the CERO). He attached a memorandum from the CERO that listed a number of instances of alleged non-cooperation. On 4 April 1994, the Acting Deputy Chief, Field Relief and Social Services Programme, wrote to the Field Administrative Officer stating that the CERO had also reported that the Applicant refused to obey the CERO's instructions and to cooperate with him.

The Applicant's periodic report dated 31 May 1994 was prepared for the purpose of deciding whether the Applicant should receive his deferred salary increment. The CERO gave the Applicant low ratings in six categories and satisfactory ratings in the remaining two. He noted, "I discussed [the Applicant's] performance

of his duties and cooperation ... but he refused to cooperate with me, and insists [on] work[ing] according to his wishes".

The Applicant's intermediate reporting officer, the Acting Field Eligibility and Registration Officer, rated the Applicant as "on the whole, an unsatisfactory staff member". He noted, "[t]he employee doesn't cooperate with his supervisor and works according to his wishes and not his job description". The comments of the Applicant's overall supervisor, the Field Eligibility, Registration, Distribution and Accommodation Officer, were similar. The Officer-in-Charge of the Relief and Social Services Department also noted that the Applicant's performance was unsatisfactory.

On 1 June 1994, the DUO, Gaza, wrote to the Applicant and advised him that, as a result of the most recent periodic report, the Applicant would not receive his deferred annual increment. Further, he noted that, since the final warning contained in the Field Administrative Officer's letter of 8 March 1994, the Applicant had "made no serious attempt to improve [his] performance. Therefore, I have no choice but to terminate your services in the interest of the Agency under Area staff regulation 9.1, effective 4 June 1994."

On 6 June 1994, the Applicant requested the DUO, Gaza, to review the decision to terminate his services. On 13 June 1994, the DUO, Gaza, confirmed the decision.

On 18 July 1994, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 3 April 1995. Its evaluation, judgement and recommendation read, in part, as follows:

> "(a) ... the Board noted that:
>
> (1) The Appellant had had a turbulent career as reported and documented during his service with the Agency in different positions (teaching and clerical).
>
> (2) The Appellant has been the subject of adverse reporting and complaint by his supervisors.

(3) Several disciplinary measures including written censure and suspension without pay were taken against the Appellant as a result of his insubordination. He was given a letter of final warning and his annual increment was deferred in the hope that he would show improvement in his performance.

(b) The Board could not establish that the decision to terminate the Appellant's service was triggered by any extraneous factors, or was motivated by bias or prejudice against the Appellant, particularly in the absence of any satisfactory reporting on his performance.

(c) In this context, the Board is of the opinion that the Administration has acted within the framework of standing rules and regulations.

III. Recommendation

25. In view of the foregoing, and without prejudice to any further oral or written submission to any party the Appellant may deem pertinent, the Board unanimously makes its recommendation to uphold the Administration's decision to terminate the Appellant's service in the interest of the Agency under Area staff rule 109.1; and that the case be dismissed."

On 3 May 1995, the Commissioner-General transmitted to the Applicant a copy of the JAB report and informed him as follows:

"I enclose herewith a copy of the report on the Area Staff Joint Appeals Board of 3 April 1995, regarding your appeal. You will note that the Board has concluded that the Administration's decision to terminate your appointment in the interest of the Agency, pursuant to Area staff regulation 9.1, was lawful and proper. The Board, therefore, recommended that the Administration's decision be upheld and that your appeal be dismissed. I accept these conclusions and recommendations; your appeal is, therefore, dismissed."

On 11 September 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contention is:

The Respondent's decision to separate him from service was arbitrary and motivated by prejudice.

Whereas the Respondent's principal contentions are:

1. The Area Staff Rules and Regulations require that the decision to terminate the Applicant's services must stand unless it was procedurally defective or improperly motivated.

2. The facts show that the Applicant's performance was poor and that the decision to terminate his services was therefore proper.

The Tribunal, having deliberated from 24 October to 21 November 1996, now pronounces the following judgement:

I. The Tribunal accepts the Applicant's plea that all the events which took place prior to his appointment, on 1 March 1985, as a Clerk in the Eligibility and Registration Division, should be considered as irrelevant in judging the Applicant's present complaint. It follows, of course, that the Applicant's own allegation of prejudice and revenge made by him against various officials of UNWRA before March 1985 should also be excluded from the scope of the present judgement.

II. The principal feature of this case is the appointment, on 3 January 1994, of a grade 8 clerk (senior to the Applicant) as Acting Camp Eligibility and Registration Officer (A/CERO) at the Deir-el-Balah Distribution Office when the incumbent became sick at the time of his retirement. The Applicant had expected to be appointed to this post, and he very much resented that someone else had been made A/CERO. The Applicant considered that the person selected had been guilty of wrong-doing, that he was much less

qualified than the Applicant and that his appointment was brought about by manipulation by the Director, Field Relief and Social Services Programme (D/FRSSP). The Applicant began a sustained protest against this appointment which he felt was not only unjust and unfair but was intended to deprive him of what he considered to be his right and was meant to "close and divert the vacancy to another place in favour of another person". He specifically accused the D/FRSSP of having an arbitrary attitude and stated that the appointment of the person selected would deprive the Applicant of his right to be considered for the post. The Applicant's argument was based on his feeling that his temporary appointment as CERO would have enabled him to claim the post later, inasmuch as such temporary appointments often place the official concerned in a favourable position in relation to other candidates for the post.

III. The Applicant's first protest was answered by the Field Administrative Officer, who found "nothing wrong" in the D/FRSSP's action. The appointment of an A/CERO would not deprive the Applicant of being considered for the post.

This reply was met with a barrage of accusations by the Applicant, not only against the D/FRSSP but also against UNWRA, which the Applicant considered to be a totalitarian organization, that was unfair especially to junior officers and manipulated by interested persons. These protests emanated, apparently, from his chagrin and resentment; however, they were virtually ignored. Meanwhile, it was found that the Applicant's work was not at all satisfactory and that he was blatantly refusing to follow any instruction from the A/CERO, who was his supervising officer, but whom he considered to be unworthy of the job and incompetent compared to himself. These developments led first to the Applicant's suspension (which he refused to accept), then to the withholding of the increments which would normally be due to him and finally to his termination. During these events, he denied all

accusations, and stressed his zeal for probity and integrity, as well as his competence and fairness. Meanwhile, the Respondent issued, on 2 March 1994, a written censure warning the Applicant that "UNWRA is not willing to accept gross insubordination as displayed through your behaviour. The fact that you were not appointed as A/CERO does not give you the right to refuse to cooperate with your supervisor." His work continued to be "less than satisfactory" and he was told that "[f]ailure to secure a satisfactory periodic report within twelve months may result in termination of your services with the Agency for unsatisfactory performance."

IV. The Applicant still insisted that his work was above reproach and he became increasingly obstreperous. In a letter dated 5 March 1994, he said, inter alia, "You intend to suspend me wrongfully" and much more in the same vein. However, he had been supplied with details of his failure to cooperate with the A/CERO and of the many other lapses found in his work and attitude. The Applicant did not agree with any of these assessments and refused to sign the periodic reports which contained unfavourable comments. In a letter dated 13 June 1994, marked "Private and Official", the Director of UNWRA Operations (DUO), Gaza, dealt with the subject entitled "Review of Termination of Service" of the Applicant and said "You claim prejudice because you criticised an 'unwise and harmful measure'. However, you were terminated because of your actions and not because of your words". He pointed out various incorrect statements which the Applicant had made and concluded "Your letter contains no new arguments which lead me to overturning my decision to terminate your services in the interest of the Agency. That decision is hereby confirmed."

V. Immediately, a significant change became noticeable. In the Applicant's letter of 18 June 1994, addressed to the DUO, Gaza, he

Rebuttal Panel and concluded that the Panel's report did not justify a change in the rating. As the Applicant herself admits in her arguments, the MRG had the "legal power" to reject the recommendation of the Rebuttal Panel. She, therefore, had the burden of proving that extraneous factors or prejudice existed which resulted in the rejection. The differences of opinion between the MRG and the Rebuttal Panel concerning the Applicant's performance do not indicate prejudice or suggest the existence of extraneous factors. The Tribunal finds that the Applicant has not offered evidence to the contrary. The Tribunal concludes that the MRG's review of the Applicant's performance and its decision to maintain the ratings were not arbitrary or based on any other improper motive.

VIII. In addition, the Applicant has not met her burden of proving that there was a lack of due process or prejudice on the part of the Respondent when he refused to renew her fixed-term appointment. It is not the role of the Tribunal to review the performance evaluations of staff members. It cannot substitute its judgement for that of the Respondent. The Tribunal can only intervene in these decisions if it is shown that the Staff Rules and Regulations, including UNFPA's Guidelines for PAR, have not been respected or that prejudice or extraneous factors have tainted the Respondent's decision. The Applicant has failed to meet the burden of proving that such factors existed.

IX. The JAB had the opportunity to analyze the Applicant's performance for the years 1991, 1992 and 1993. It found that her performance had been properly reviewed under the PAR system by her supervisors and the MRG. The Tribunal can only concur with the JAB's findings.

X. Based on the foregoing, the Tribunal rejects the Applicant's pleas in their entirety.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary